

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DAVIS,

Plaintiff,

vs.

CORRECTIONAL MEDICAL SERVICES
INC., et al.,

Defendants.

Case No. 1:05-CV-100

Hon. Gordon J. Quist

REPORT AND RECOMMENDATION

This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. § 1983.

This matter is before the court on plaintiff's motion seeking entry of a default judgment pursuant to Fed. Rules Civ. Proc. 55(b) against defendants Correctional Medical Services, Inc., Craig Hutchinson, M.D., Dr. Isaac [sic], and Deb Viher, N.P. for their failure to answer or otherwise defend (docket no. 23).

DISCUSSION

The entry of a default judgment involves two steps: the entry of a default pursuant to Fed. Rules Civ. Proc. 55(a) and the entry of a default judgment pursuant to Fed. Rules Civ. Proc. 55(b). *See Ramada Franchise Systems, Inc. v. Baroda Enterprises, LLC*, 220 F.R.D. 303, 304-05 (N.D. Ohio 2004). Rule 55(a) provides that “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party’s default.” Then, either the clerk or the court may enter a default judgment pursuant to Rule 55(b). The entry of a

default pursuant to Rule 55(a) must precede grant of a default judgment pursuant Rule 55(b). *See Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 783 (8th Cir. 1998); *Ramada Franchise Systems*, 220 F.R.D. at 305.

In his motion, plaintiff states that “a default has been entered” against these four defendants. This statement is incorrect. The clerk did not enter a default as to these four defendants. See Rule 55(a). In fact, the record reflects that these four defendants have appeared and are actively defending the suit. There has been no prejudice to plaintiff.

RECOMMENDATION

Plaintiff’s motion for default judgment is procedurally improper since no default has been entered and the named defendants have appeared and are defending the action. Accordingly, I respectfully recommend that plaintiff’s motion for default judgment (docket no. 23) be **DENIED**.

Dated: August 31, 2005

/s/ Hugh W. Brenneman, Jr.
Hugh W. Brenneman, Jr.
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be served and filed with the Clerk of the Court within ten (10) days after service of the report. All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to serve and file written objections within the specified time waives the right to appeal the District Court’s order. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).